

August 31, 2004

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-31 is available for public comments under this procedure. It was requested by counsel, Cleta Mitchell, on behalf of Russ Darrow Group, Inc. ("RDG").

Proposed Advisory Opinion 2004-31 is scheduled to be on the Commission's agenda for its public meeting of Thursday, September 9, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on September 8, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

### **CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-31, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

### **MAILING ADDRESSES**

Commission Secretary  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

Rosemary C. Smith  
Associate General Counsel  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

August 31, 2004

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence H. Norton  
General Counsel

Rosemary C. Smith  
Associate General Counsel

Brad C. Deutsch  
Assistant General Counsel

Robert M. Knop  
Staff Attorney

Subject: Draft AO 2004-31

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 9, 2004.

Attachment

1 ADVISORY OPINION 2004-31

2  
3 Cleta Mitchell, Esq.  
4 Foley & Lardner LLP  
5 Washington Harbour  
6 3000 K Street, NW, Suite 500  
7 Washington, DC 20007  
8

**DRAFT**

9 Dear Ms. Mitchell:

10  
11 This responds to your letters dated July 21 and July 30, 2004, requesting an  
12 advisory opinion on behalf of Russ Darrow Group, Inc. (“RDG”), concerning the  
13 application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and  
14 Commission regulations, to certain radio and television advertisements that RDG is  
15 planning to run.

16 ***Background***

17 You state that RDG, a Wisconsin corporation, is in the commercial business of  
18 selling to the general public in Wisconsin a variety of products and services, including  
19 new and used automobiles, vehicle repair and maintenance services, leasing  
20 owner/operator trucks and trailers, auto fleet leasing and maintenance tracking, and  
21 vendor equipment leasing. You indicate that RDG owns and operates 22 vehicle  
22 franchise dealerships in Wisconsin, all of which include “Russ Darrow” as part of the  
23 dealership’s name (*e.g.*, Russ Darrow West Bend, Russ Darrow Appleton Chrysler). You  
24 state that during the past decade, RDG has focused on developing “Russ Darrow” as a  
25 brand name for its dealerships.

26 Russ Darrow, Jr. (“the Candidate”) is a candidate for the U.S. Senate in the  
27 Wisconsin Republican primary election, which is scheduled to be held on Tuesday,  
28 September 14, 2004. If the Candidate wins this primary election, he will be the

1 Republican candidate for the U.S. Senate from Wisconsin in the general election, which  
2 is scheduled to be held November 2, 2004. The Candidate's principal campaign  
3 committee is Russ Darrow for Senate, Inc. ("the Committee").

4 In addition to being a candidate for the U.S. Senate, the Candidate is the founder,  
5 Chief Executive Officer, and Chairman of the Board of RDG. His son and namesake,  
6 Russ Darrow III, serves as RDG's President and Chief Operating Officer. You represent  
7 that Russ Darrow III is primarily responsible for all day-to-day operations, plans, and  
8 business activities of RDG, including the oversight and ultimate decision-making  
9 authority regarding discretionary advertising by RDG.

10 You state that RDG has continually utilized electronic media, including television  
11 and radio, to advertise its products and services for 38 years, and that RDG plans to  
12 continue to air such advertisements for the foreseeable future. You represent that Russ  
13 Darrow III replaced the Candidate as RDG's spokesman in the late 1980s and began  
14 appearing in RDG advertisements at that time. Russ Darrow III has been the public face  
15 of RDG in its advertisements for over a decade. You further state that the Candidate has  
16 not appeared in any of RDG's advertisements in more than a decade.

17 You also state that the Candidate was not involved in any way in the formation of  
18 the television and radio advertising contracts for 2004. You represent that all of RDG's  
19 advertising decisions are made without regard to the Candidate or any campaign for  
20 Federal office and are not coordinated with the Candidate, the Committee, or its agents.  
21 You state that the Candidate and RDG are two distinct and separate legal entities  
22 operating and advertising separately and without consultation or coordination with one  
23 another. You also state that the Committee and RDG have no common media vendors of

1 any kind and that each makes wholly separate and independent decisions regarding the  
2 creation, production, and distribution of any and all advertising and other promotions.

3 You have provided a sampling of television and radio advertising scripts used by  
4 RDG in recent years. You represent that although the scripts for the television and radio  
5 advertisements RDG plans to air during the remainder of 2004 have not yet been  
6 developed, none of those advertisements will reference the Candidate's campaign either  
7 directly or indirectly. In addition, you indicate that the Candidate will not appear or  
8 speak in any such advertisements.<sup>1</sup> You also state that the proffered scripts of past radio  
9 and television advertisements aired by RDG are representative of the scripts that RDG is  
10 using currently and which it will use in the coming months.<sup>2</sup>

11 ***Question Presented***

12 Would the proposed RDG radio and television advertisements that include the  
13 name "Russ Darrow" be electioneering communications within the meaning of the Act  
14 and Commission regulations?

15 ***Legal Analysis and Conclusions***

16 RDG's radio and television advertisements that include the name "Russ Darrow"  
17 would not be electioneering communications as defined in 2 U.S.C. 434(f)(3)(A)(i) and  
18 11 CFR 100.29. This conclusion rests on the factual circumstances presented in which  
19 the use of the name "Russ Darrow" refers to a business or to another individual who is  
20 not a candidate.

21 The Act, as amended by BCRA, prohibits corporations from making or financing  
22 electioneering communications. *See* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(2)(iii); *see*

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<sup>1</sup> You state that Russ Darrow III will not appear in any of the Committee's advertisements.

1 *also* Advisory Opinion 2004-15. An “electioneering communication” is any broadcast,  
2 cable, or satellite communication that (1) refers to a clearly identified Federal candidate;  
3 (2) is publicly distributed for a fee within 30 days before a primary election or 60 days  
4 before a general election; and (3) is targeted to the relevant electorate. *See* 2 U.S.C.  
5 434(f)(3)(A)(i) and 11 CFR 100.29(a); *see also* Advisory Opinions 2004-15 and 2003-12.  
6 Your request acknowledges that RDG’s proposed radio and television advertisements  
7 satisfy the last two prongs of this test. The issue here is whether the advertisements refer  
8 to a clearly identified Federal candidate.

9 Commission regulations provide that the term “refers to a clearly identified  
10 candidate” means that the candidate’s name, nickname, photograph, or drawing appears,  
11 or the identity of the candidate is otherwise apparent through an unambiguous reference  
12 such as “the President,” “your Congressman,” or “the incumbent,” or through an  
13 unambiguous reference to his or her status as a candidate such as “the Democratic  
14 presidential nominee” or “the Republican candidate for Senate in the State of Georgia.”  
15 11 CFR 100.29(b)(2).

16 The Commission concludes that your proposed advertisements refer to RDG’s car  
17 dealerships or Russ Darrow III, and not to the Candidate. First, the Candidate himself  
18 does not speak or appear on screen in any of the advertisements. Second, another  
19 individual, Russ Darrow III, does speak and appear in the advertisements. You indicate  
20 that he, not the Candidate, has been the public face of the company for more than ten  
21 years. Third, “Russ Darrow” is part of the name of all of RDG’s dealerships, which RDG  
22 has worked for a decade to develop as a brand name for all its dealerships. Finally, while

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<sup>2</sup> *See* Attachment A for scripts of RDG’s typical television and radio advertisements.

1 the name “Russ Darrow” is used throughout the proposed advertisements, most of these  
2 references include the full name through which a particular dealership does business  
3 (*e.g.*, Russ Darrow Toyota, Russ Darrow Kia, Russ Darrow Cadillac). While a couple of  
4 the proposed advertisements also include a single reference to “Russ Darrow,” rather  
5 than the full name through which the dealership does business, these references, taken  
6 together with the other references in the advertisement, also refer to the business entity  
7 and not to the Candidate. Therefore, the Commission concludes that RDG’s television  
8 and radio advertisements do not refer to a clearly identified candidate under 11 CFR  
9 100.29(b)(2).

10 In the rulemaking proceeding in which the Commission adopted its regulations on  
11 electioneering communications, the Commission considered but declined to create an  
12 exemption for situations where a Federal candidate shared a name with a business entity  
13 because it concluded that such communications could well be considered to promote or  
14 support the clearly identified candidate. *See* Explanation and Justification, Final Rules  
15 on Electioneering Communications, 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002). The  
16 decision not to adopt a blanket exemption for such communications, however, does not  
17 preclude the Commission from making a determination that the specific facts and  
18 circumstances of a particular case indicate that certain advertisements do not refer to a  
19 clearly identified Federal candidate and, hence, do not constitute electioneering  
20 communications. As stated above, the Commission concludes that the advertisements at  
21 issue in this case do not constitute electioneering communications under 2 U.S.C.  
22 434(f)(3)(A)(i) and 11 CFR 100.29(a). Furthermore, on the basis of the facts you



present, there is no indication that the advertisements have been or will be coordinated with the Candidate under 2 U.S.C. 441a(a)(7)(B)(i) and 11 CFR 109.21.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Bradley A. Smith  
Chairman

Enclosures (AOs 2004-15 and 2003-12)

**RUSS DARROW TOYOTA**  
**:30 TV "Toyota Clearance"**  
**Air Dates: July 2002**  
**Spot #RDWBTv-019**

<u>VIDEO</u>	<u>AUDIO</u>
RD III On Camera CG: Russ Darrow, III  CG: Toyota's Cost Less in West Bend  CG: Russ Darrow Toyota Clearance '02 Toyota Camry Footage CG: 2002 Toyota Camry \$189 a month Due at start: \$3,690 Disclaimer A CG: Clearance Priced  CG: Wisconsin's All-Time Sales Leader Disclaimer B  Toyota Building Footage CG: Toyotas Cost Less In West Bend  RD III On-Camera	(RD III) Russ Darrow Toyota's '02 Clearance is the sale you've been waiting for! (:05)  Toyota's cost less in West Bend - we'll prove it.  Right now, lease the all-new 2002 Toyota Camry for just \$189 a month.  This is the first time this Camry has been clearance-priced.  Wisconsin's all-time sales leader has a special allocation of Toyotas, so hurry in for your best selection.  We'll prove to you that Toyotas cost less in West Bend at Russ Darrow. (:17)  (On-Camera) Only at Russ Darrow Toyota. (:03 )
Logo Fly-In CG: Russ Darrow Toyota West Bend 262-334-9411 or 1-877-888-0777	(:03 Singout)

Disclaimer A: \$3,000 down. Tax, title & license extra. 60 mo. lease \$3690 due at start. To approved credit. Not valid in conjunction with any other advertised offer.

Disclaimer B: Based on total automotive sales.

ATTACHMENT

Page 1 of 6

**Russ Darrow Appleton/Oshkosh**  
**"Job & \$99" (Full Line)**  
**:30**  
**DATV-052 Appleton/Oshkosh Version**  
**Air Date: November, 2003**

Video	Audio
Appleton/Oshkosh Kia footage	(Tracy) Are you looking for a used car?
Quick cuts of Kia's	Do you have a job? Do you have \$99? Then
CG: Job + \$99 down= Brand New Kia	why buy a used car. when you can get a
Disclaimer: \$99 down payment. 9.5%	brand new Kia at Wisconsin's #1 Kia dealer.
APR, 72 mos. Tax, title, license &	Russ Darrow Kia.
service fee extra.	Get a brand new Kia Rio starting at just
Russ Darrow Logo	\$7,676.
CG: Wisconsin's #1 Kia Dealer	All you need is a job and \$99. Call 1-866-4-
Disclaimer A	new-kia to get a new Kia with a 10-year
Rio Footage	100,000 mile factory warranty.
CG: \$7,676	A job & 99 dollars is all you need. Call 1-
Disclaimer B	866-4-new-kia today!
CG: Job + \$99 down = Brand New Kia	(:27)
CG: 10-year, 100,000 mile warranty	(Russ Darrow :03 singout)
<b>Disclaimer: Limited powertrain</b>	
<b>warranty – see salesperson for details</b>	
CG: 1-866-4-new-kia now	
<b>ADD 'Make Every Mile Count' TO</b>	
<b>EACH TAG</b>	
Russ Darrow Kia	
(Appleton/Oshkosh )	
College Avenue; Appleton	
Oshkosh	
Kia Outlet Center	
2625 S. Washburn Street	
CG: 1-866-4newkia	

Disclaimer A: Based on '02 sales for all Russ Darrow Kia stores in Wisconsin.

Disclaimer B: All rebates applied. Not valid with other advertised offers. Tax, title, service fee & license extra. For qualified credit.

RDIII	<p>Cadillac. Style luxury Hi. I'm Russ Darrow inviting you to visit Russ Darrow Cadillac in Waukesha. Where we uphold the Cadillac legacy of style, luxury and performance everyday. At Russ Darrow Cadillac, you'll find a huge selection of Cadillacs and receive award-winning service every time you bring your Cadillac in. Whether you're in the market for a classic sedan or SUV, you can be sure Russ Darrow Cadillac has it. And while shopping for your Cadillac, a single detail won't be missed. We know the importance of taking care of our customers. That's why you'll always find incredible service specials to help to maintain your Cadillac. When it comes to care for your Cadillac, you shouldn't settle for anything less than the best. We're Wisconsin's all-time sales leader and we want to be your Cadillac dealership. Stop into Russ Darrow Cadillac, on Highway 18 in Waukesha, and see what Cadillac style really is all about.</p>
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**Russ Darrow Group**  
**:30 "Minivan Madness"**  
**Air Dates: July, 2004**  
**RDCJDTV-004**

Video	Audio
RDIII on camera CG: RD Logo throughout spot CG: Russ Darrow, III (footage from 6/04 shoot)  CG: Minivan Madness Sale '04 T&C/Caravan CG: 2004 Chrysler Town & Country 2004 Dodge Caravan CG: Closeout Priced  CG: 2004 Dodge Grand Caravan \$6,000 Below Factory Invoice Disc.: Factory invoice may not reflect actual dealer cost due to holdbacks and incentives.  2005 Chrysler Town & Country and Dodge Caravan Footage CG: 2005 Chrysler Town & Country CG: 2005 Dodge Caravan CG: Introductory Sale Priced Plus Factory Rebates Up to \$2000  CG: Minivan Madness	(RDIII on camera:) <i>It's Minivan Madness at Russ Darrow. (:03)</i>  (RDIII off camera):  Right now, choose from hundreds of Town and Country's or Caravans - closeout priced to move.  Every remaining '04 Dodge Grand Caravan will be sold at \$6,000 below factory invoice.  Every '05 minivan will be introductory sale priced to move - plus get factory rebates up to \$2,000.  It's Minivan Madness. (:21)  (RDIII on camera): <i>Only at Russ Darrow Chrysler-Jeep-Dodge. (:03)</i>
<u>CG: Russ Darrow Group Logo</u> CG: Chrysler Jeep Dodge 7676 North 76 <sup>th</sup> Street Minutes From Anywhere	(:03 RD Sing-Out)

ATTACHMENT A

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**RUSS DARROW CHRYSLER :60 RADIO "TWO GIRLS REV 2" AIRS WEEK  
OF 3/29**

**JOANNE/MITCH - FAST SALE - DCJTG329**

**SFX:** CAR WON'T TURN OVER. FRUSTRATED WOMAN SAYS, "OHhh". SHE GETS OUT OF CAR, SLAMS DOOR

**SFX:** TELEPHONE RINGS

**GIRL 2:** HI, I HATE TO ASK YOU AGAIN BUT, CAN YOU PLEASE PICK ME UP TODAY?

**GIRL 1:** LET ME GUESS, YOUR CAR WOULDN'T START AGAIN!

**GIRL 2:** YEAH!

**GIRL 1:** HOW LONG ARE YOU GOING TO WAIT UNTIL YOU GET A NEW CAR?

**GIRL 2:** WELL, I'VE BEEN SHOPPING AROUND BUT I HAVEN'T FOUND A GREAT DEAL.

**GIRL 1:** YOU HAVEN'T BEEN TO RUSS DARROW CHRYSLER-JEEP-DODGE

**MALE ANNOUNCER IN:**

**MUSIC IN: FAST SALE**

DON'T MISS THE 2004 SPRING CLEARANCE EVENT! AT WISCONSIN'S ALL-TIME SALES LEADER RUSS DARROW CHRYSLER JEEP DODGE WE PURCHASED ANOTHER DEALERS INVENTORY JUST FOR THIS EVENT! NOW The largest Chrysler-Jeep-Dodge inventory in Wisconsin IS BIGGER & BETTER THAN EVER! CHOOSE FROM OVER 1,000 NEW CHRYSLERS, JEEPS AND DODGES HUNDREDS OF '04 JEEP grand cherokees & LIBERTIES HUNDREDS OF '04 CHRYSLER AND DODGE MINIVANS! ALL AT THE LOWEST ADVERTISED PRICE ...GUARANTEED!SFX: ANVIL OR WE'LL GIVE YOU THE CAR FREE! plus, Get 0% long term financing PLUS the rebate! AT RUSS DARROW CHRYSLER JEEP DODGE 7676 N. 76th STREET IN BEAUTIFUL MILWAUKEE CALL 1-888-455-3000

**DISCLAIMER:** OFFERS WITH APPROVED CREDIT. YOU MUST PRESENT COMPETITOR'S AD FOR EXACT SAME VEHICLE AT TIME OF PURCHASE. NOT VALID WITH ANY OTHER OFFER.

ATTACHMENT

Page 5 of 6

**RUSS DARROW HONDA :60 RADIO "VEHICLE UPGRADE NOTICE" AIRS  
WEEK OF 7/12**

**PROPULSION - HONDA MUSIC - RDHVU712**

**SFX: NEWS TELETYPE, WITH A SERIOUS SOUND EFFECT UNDER  
ATTENTION LISTENERS IN MILWAUKEE AN OFFICIAL HONDA UPGRADE  
NOTICE HAS BEEN ISSUED IN YOUR AREA: IF YOU'RE INTERESTED IN  
GETTING OUT OF YOUR OLD CAR AND INTO A BRAND NEW HONDA PLEASE  
BRING YOUR VEHICLE AND PAYMENT BOOK DIRECTLY TO RUSS SFX  
DARROW SFX HONDA! SFX**

**MUSIC IN:**

**RUSS DARROW HONDA WILL TERMINATE YOUR CURRENT LEASE OR LOAN  
ON THE SPOT, EVEN IF YOU OWE \$5,000 MORE THAN IT'S WORTH! AND GET  
YOU INTO A BRAND NEW HONDA EVEN IF YOUR CREDIT IS LESS THAN  
PERFECT! OR MAKE ABSOLUTELY NO PAYMENTS 'TIL JULY 2005! CHOOSE  
FROM OVER 1,000 NEW AND PRE-OWNED HONDAS! AND RIP UP THE  
STICKER! (PRONOUNCE CLEARLY) BECAUSE YOU NEVER, (SFX) PAY  
(SFX) RETAIL (SFX) (PRONOUNCE CLEARLY) AT RUSS SFX DARROW SFX  
HONDA! SFX BRAND NEW HONDA CIVICS JUST 99 A MONTH! BRAND NEW  
HONDA ACCORDS JUST 149 A MONTH!**

**MUSIC OUT:**

**HONDA UPGRADE EVENT! HUGE ECHO**

**MUSIC IN:**

**WE'LL TERMINATE YOUR CURRENT LEASE OR LOAN EVEN IF YOU OWE  
\$5,000 MORE THAN IT'S WORTH! AND GET YOU INTO A BRAND NEW  
HONDA EVEN IF YOUR CREDIT IS LESS THAN PERFECT! OR MAKE  
ABSOLUTELY NO PAYMENTS 'TIL JULY 2005! THIS WEEK ONLY AT RUSS  
SFX DARROW SFX HONDA! SFX  
ON BROWN DEER ROAD AT 91ST STREET,  
CALL 866-260-4926**

**DISCLAIMER: TO QUALIFIED BUYERS. 36-MONTH LEASE. 2700 DOWN,  
PLUS, FIRST MONTH, TAX, TITLE LICENSE & SERVICE FEE. CIVIC MODEL  
ES1634W, ACCORD MODEL CM5514PLW, MANY TO CHOOSE.**